No. 88-1271

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

HENRY KLEPAK, PETITIONER

v.

ELIZABETH DOLE, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

MARK S. FLYNN
Attorney
Department of Labor
Washington, D.C. 20210

22pp

QUESTIONS PRESENTED

1. Whether petitioner, a non-fiduciary attorney who knowingly and actively participated in fiduciary breaches committed by the trustee of an employee benefit plan, was properly held liable under the Employee Retirement Income Security Act for the losses that the plan sustained as a result of the breaches.

2. Whether petitioner was properly required to return the salary he received from the plan when one of the fiduciary breaches in which he participated involved his advice to the trustee to enter into an unreasonable compensation agreement for his legal services.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 32a-51a) is reported at 853 F.2d 1298. The final judgment (Pet. App. 24a-27a) and amended final judgment (Pet. App. 28a-31a) of the district court and its findings of fact and conclusions of law (Pet. App. 1a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 9, 1988. A petition for rehearing was denied on October 14, 1988 (Pet. App. 52a). The petition for a writ of certiorari was filed on January 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of Labor filed this action to enforce the fiduciary responsibility provisions of Title I of the

Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1101-1114. It originated in an earlier suit by the Secretary also alleging violations of ERISA's fiduciary provisions (Pet. App. 2a-3a, 38a). In the prior action, the Secretary charged that Theodore Shanbaum and Ellis Carp had violated their fiduciary duties as trustees for the Lee Optical and Associated Companies Pension and Profit Sharing Plans (the "Plans"), which are ERISA-covered employee pension benefit plans (see 29 U.S.C. 1002(2)(A)) that provide retirement benefits to employees of Lee Optical, Inc., and its subsidiaries (Pet. App. 3a, 13a, 38a). Specifically, the Secretary asserted that Shanbaum and Carp had breached their fiduciary duties by lending and transferring substantial assets of the plans to Lee Optical, in which Shanbaum and Carp were the principal shareholders, and to Dal-Tex, Inc., a wholly-owned subsidiary of Lee Optical and sponsoring employer of the Plans (*id.* at 2a-3a, 37a-38a). Petitioner Henry Klepak, an attorney, represented the defendants—Shanbaum, Carp, Lee Optical, and Dal-Tex—in that action (*id.* at 3a, 38a).

The parties resolved the earlier action through a consent order (Pet. App. 3a, 38a). The consent decree provided that Shanbaum, the sole surviving trustee, would be discharged and that Oscar Lindemann would become trustee for the Plans (*ibid.*). The decree also obligated Dal-Tex to pay the pension and profit-sharing plans more than $1.1 million (*id.* at 38a). If Dal-Tex did not pay that amount within a specified time, the decree provided that Shanbaum and Carp (then represented by his estate) had to satisfy the obligation personally (*id.* at 4a, 38a).

When it became apparent that Dal-Tex could not make the necessary payments, Shanbaum and Carp's estate offered to transfer their two-thirds interest in a joint ven-

ture, SCP, to the Plans (Pet. App. 2a, 5a, 38a-39a).[1] SCP's assets consisted of a radio station and a microwave telecommunications system (*id.* at 38a-39a). Acting on petitioner's advice, Lindemann, the new trustee, accepted on behalf of the Plans the two-thirds interest in those properties at a valuation of approximately $1.5 million. Because that amount exceeded Shanbaum's and Carp's debt to the Plans, Lindemann caused the Plans to repay to SCP the "overpayment" of $364,558.96 (*id.* at 5a, 15a, 39a). In approving the transfer of the properties in satisfaction of the decree, Lindemann did not request or review any appraisals of the properties, but relied instead on petitioner's untrue representations that the Labor Department, as well as the district court that had entered the consent order, had approved the terms of the agreement transferring the properties (*id.* at 15a, 39a).[2]

In addition, Lindemann retained petitioner as attorney for the Plans (Pet. App. 10a). Petitioner advised Lindemann as to both Lindemann's rate of compensation by the Plans and the terms of his own compensation agreement with the Plans (*ibid.*). The latter agreement, which was irrevocable for four years, entitled petitioner to receive $2,500 per month for his services, excluding such services as litigation and legal research (*ibid.*).

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[1] The Plans already owned the remaining one-third interest in SCP, which was named for Shanbaum, Carp, and the Plans (Pet. App. 38a).

[2] The consent order provided that Shanbaum and Carp could satisfy their obligations under the decree by a transfer of property in lieu of cash, but only if the new trustee determined that the value of the property was equivalent to the amount owed under the decree and that the proposed transaction was in the interests of the Plans (Pet. App. 38a).

2. The Secretary subsequently brought this action pursuant to Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. 1132(a)(2) and (5), against petitioner, Lindemann, Shanbaum, the estate of Carp, and Lee Optical (Pet. App. 1a, 13a). The Secretary alleged, inter alia, that Lindemann, with the knowing participation of petitioner, had violated his fiduciary responsibilities to the Plans with respect to Shanbaum's and Carp's monetary obligations under the consent order and in setting his and petitioner's compensation from the Plans (*id.* at 14a-19a). In the district court, petitioner did not dispute that, as a matter of law, a nonfiduciary who has knowingly participated in a fiduciary breach may be held liable under ERISA to an employee benefit plan.

After trial, the district court held that Lindemann had violated his fiduciary responsibilities by failing to take appropriate steps to evaluate the property accepted on behalf of the Plans in the transfer agreement and by relying solely on petitioner's representations that the terms of the transfer were authorized (Pet. App. 15a). The district court further found that, while Shanbaum and Carp's interest had been valued at more than $1.5 million, their interest "was worth no more than $750,000" (*id.* at 9a). Accordingly, the court concluded that the Plans had suffered losses as a result of Lindemann's breaches (*id.* at 8a-9a, 16a). The court also held that petitioner, although a nonfiduciary, was liable for the Plan's losses because he had been a knowing participant in the fiduciary breaches (*id.* at 16a-17a). It found that petitioner had "drafted the transfer agreement and induced Lindemann to sign it with the false representation that the terms had been approved by the Secretary of Labor and the Court" (*id.* at 17a).

As to the compensation arrangements, the court held that Lindemann had breached his fiduciary responsibilities in setting his and petitioner's salary. The court specifically

found that the compensation agreement between petitioner and the Plans was "unreasonable" (Pet. App. 11a, 18a), and went on to hold that petitioner was a knowing and active participant in this breach as well (*id.* at 19a).

The court assessed joint and several liability against petitioner, Lindemann, and Shanbaum for the Plan's losses resulting from the transfer to it of the radio station and microwave system (Pet. App. 18a, 28a).[3] As to those losses, the court granted Lindemann's claim against petitioner for indemnification because petitioner "possessed superior knowledge of the situation * * * [and] because of his role as an attorney" (*id.* at 20a-21a). It also required petitioner to return his full salary to the plan; Lindemann was required to disgorge one-half of the salary he had received (*id.* at 29a).

3. On appeals by petitioner and Lindemann, the court of appeals affirmed in part and reversed in part (Pet. App. 32a-51a). The court approved the lower court's ruling, which petitioner had not challenged, that a non-fiduciary can be held liable under ERISA for his knowing and active participation in a fiduciary breach (*id.* at 41a). It rejected petitioner's argument that a non-fiduciary can be held liable only for the amount by which he profited from the breach, and agreed with the district court that petitioner was jointly liable for the full measure of the Plans' losses (*ibid.*). The court ruled, however, that the district court should not have ordered petitioner to indemnify Lindemann (*id.* at 42a). The court reasoned that Lindemann, a sophisticated businessman, had abdicated his responsibility to investigate the value of the transferred

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[3] The district court found that, in addition to petitioner, Shanbaum was a knowing participant in Lindemann's fiduciary breach of accepting the overvalued properties in satisfaction of the consent order (Pet. App. 16a-17a).

properties, and hence could not transfer his entire liability to a non-fiduciary participant (*ibid.*).

The court vacated the damage award, however, because it concluded that the Plans appeared not to have suffered a loss equal to the amount by which the transferred properties were overvalued (Pet. App. 45a). Since the radio station and microwave system seemed to be Shanbaum's and Carp's only assets, the court reasoned, the Plans may not have been damaged except to the extent that the Plans refunded money to them.[4] The court therefore remanded the case to the district court for it to determine if Shanbaum and Carp had any other assets that could have satisfied the consent order obligation (*id.* at 46a).[5]

Finally, the court ruled that the district court had not abused its discretion in requiring petitioner to reimburse the Plans for the compensation he had received (Pet. App. 49a).

ARGUMENT

1. Although petitioner now seeks (Pet. 6) to challenge the court of appeals' conclusion that ERISA imposes liability on non-fiduciaries who knowingly participate in fiduciary breaches, he may not do so because he did not raise that argument below. Moreover, the court below cor-

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[4] Noting that the Plans owned one-third of SCP, the court of appeals concluded that, although the Plans had made an overpayment of $364,558.96 to SCP, the Plans were actually damaged by only $243,038 as a result of the refund (Pet. App. 45a).

[5] The court of appeals vacated other aspects of the district court's damages award as well. The court reversed an allowance of $300,000 in operating losses because the Plans would have suffered those losses even if the properties had been properly valued (Pet. App. 46a-47a). In addition, it ordered the district court on remand to reconsider its award of prejudgment interest (*id.* at 47a-49a).

rectly stated, following the majority of the courts of appeals, that a non-fiduciary may be held liable in those circumstances. Review is not warranted on account of a contrary decision by the Ninth Circuit, since that decision is wrong and appears to be in conflict with another decision by that court of appeals.

a. In the courts below, petitioner did not contend that non-fiduciaries cannot be liable under ERISA for losses suffered by employee benefit plans as a result of fiduciary breaches that they knowingly aided and abetted. Rather, in the district court petitioner primarily argued that he had not participated in any fiduciary breaches and, in the court of appeals, he focused his challenge on the narrower ground that, as a non-fiduciary, his liability was limited to the amount of his profits from the breaches. Indeed, on appeal he acknowledged that non-fiduciaries may be required to disgorge their profits (C.A. Br. 26-27), and stated that "the issue resolved incorrectly by the Trial Court below is the *extent* of the non-fiduciary's liability" (*id.* at 27). Because petitioner did not raise below the issue he now seeks to present, this is not an appropriate case in which to decide whether a non-fiduciary may be held liable under ERISA. See *City of Springfield* v. *Kibbe,* 480 U.S. 257, 259 (1987) (writ of certiorari dismissed as improvidently granted because of "considerable prudential objection" to resolving questions that petitioner had failed to preserve in lower courts).[6]

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[6] Petitioner's focus on the *extent* of his liability rather than whether ERISA permits such liability at all provides a separate basis for declining review. The decision of the court of appeals did not finally dispose of this case, but remanded to the district court to redetermine the damages that the Plans sustained. Should petitioner be satisfied with the result on remand, he will have no need for relief from this Court. Should he still be dissatisfied with the extent of his liability, petitioner may renew his contentions here. There is, accordingly, no reason for

b. Furthermore, the court of appeals' statement that petitioner was properly held liable for the Plans' losses "as a nonfiduciary who knowingly participated in a breach of trust" (Pet. App. 41a) is correct. Virtually every court to address the issue has ruled that ERISA imposes liability on non-fiduciaries who knowingly participate in fiduciary breaches. *Brock* v. *Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d 1209, 1220 (2d Cir. 1987); *Fink* v. *National Sav. & Trust Co.*, 772 F.2d 951, 958 (D.C. Cir. 1985); *Thornton* v. *Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982). See also *Brock* v. *Gerace*, 635 F. Supp. 563, 566 (D.N.J. 1986); *Foltz* v. *U.S. News & World Report, Inc.*, 627 F. Supp. 1143, 1167-1168 (D.D.C. 1986); *Donovan* v. *Schmoutey*, 592 F. Supp. 1361, 1395-1396 (D. Nev. 1984); *Donovan* v. *Bryans*, 566 F. Supp. 1258, 1266-1267 (E.D. Pa. 1983); *Donovan* v. *Daugherty*, 550 F. Supp. 390, 410-411 (S.D. Ala. 1982); *Freund* v. *Marshall & Ilsley Bank*, 485 F. Supp. 629, 641-642 (W.D. Wis. 1979). But see *Nieto* v. *Ecker*, 845 F.2d 868 (9th Cir. 1988); *Jordan* v. *Reliable Life Insurance Co.*, 694 F. Supp. 822, 829-830 (N.D. Ala. 1988) (dicta).

Section 409 of ERISA, 29 U.S.C. 1109, expressly makes a fiduciary liable for losses that a plan suffers because of the fiduciary's breach of his statutory duties. Section 502(a)(2) of ERISA, 29 U.S.C. 1132(a)(2), authorizes the Secretary of Labor, participants, beneficiaries, and fiduciaries to sue for relief under Section 409. Although

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this Court to depart from its usual practice of declining to review non-final orders of the courts of appeals. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916).

the statute contains no provision specifically imposing liability on non-fiduciaries, that liability exists in the broad enforcement authority that Sections 502(a)(3) and (5) of the Act, 29 U.S.C. 1132(a)(3) and (5), confer on the Secretary of Labor and on participants, beneficiaries, and fiduciaries. *Lowen* v. *Tower Asset Management, Inc.*, 829 F.2d at 1220; *Brock* v. *Gerace*, 635 F. Supp. at 566; *Foltz* v. *U.S. News & World Report, Inc.*, 627 F. Supp. at 1167-1168; *Donovan* v. *Bryans*, 566 F. Supp. at 1266-1267; *Freund* v. *Marshall & Ilsley Bank*, 485 F. Supp. at 641. Section 502(a)(5) empowers the Secretary to bring civil actions "(A) to enjoin any act or practice which violates any provision of [Title I of ERISA], or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of [Title I of ERISA]." Section 502(a)(3) provides participants, beneficiaries, and fiduciaries with the same broad authority.

Sections 502(a)(3) and (5) make clear Congress's intent to provide broader authority to redress violations of ERISA's fiduciary responsibility provisions than simply to impose liability on the fiduciaries alone. The authority that Sections 502(a)(3) and (5) provide—embracing any appropriate equitable relief to redress violations of ERISA—empowers the federal courts to grant the full range of equitable remedies to accomplish the remedial purposes of the Act. Under the law of trusts, it is a well-established equitable principle that a knowing participant in a fiduciary breach—whether or not a fiduciary himself—can be jointly and severally liable for the full amount of the loss sustained as a result of that breach.[7] See G. Bogert, *The Law*

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[7] The elements of knowing participation in a fiduciary breach are "(a) an act or omission which furthers or completes the breach, and (b) actual or constructive knowledge at the time that the transaction

of Trusts and Trustees §§ 868, 901 (rev. 2d ed. 1982); 4 A. Scott, *The Law of Trusts* §§ 290-295, 321-326 (3d ed. 1967 & Supp. 1985); *Restatement (Second) of Trusts* §§ 290-297, 321-326 (1959); *Blankenship* v. *Boyle,* 329 F. Supp. 1089, 1099 (D.D.C. 1971) (pre-ERISA decision involving an employee benefit plan).

Imposing such liability on non-fiduciaries also derives from the statute's purpose of protecting plans and their beneficiaries and from its legislative history, which demonstrates Congress's intent to adopt the common law of trusts when appropriate to achieve that purpose. ERISA is a "comprehensive remedial statute designed to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' " (*Eaves* v. *Penn,* 587 F.2d 453, 457 (10th Cir. 1978), quoting 29 U.S.C. 1001(b)) and, like other remedial statutes, should be given a broad construction to effectuate its goals. *IUE AFL-CIO Pension Fund* v. *Barker & Williamson, Inc.,* 788 F.2d 118, 124 (3d Cir. 1986). See also *Central States, Southeast & Southwest Areas Pension Fund* v. *Central Transp., Inc.,* 472 U.S. 559, 570-571 (1985). Imposing traditional trust law liability on persons who knowingly participate in fiduciary breaches deters violations of ERISA's provisions and provides plans with greater ability to make full recovery of any losses caused by fiduciary breaches. Cf.

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amounted to a breach or the legal equivalent of such knowledge." *Donovan* v. *Schmoutey,* 592 F. Supp. 1361, 1396 (D. Nev. 1984) (citations omitted). See also G. Bogert, *The Law of Trusts and Trustees* § 901, at 258-259 (rev. 2d ed. 1982). Thus, petitioner is incorrect when he asserts (Pet. 17) that the decision below sets no standards for the liability of a non-fiduciary attorney providing services to a plan. Moreover, petitioner did not dispute before the court of appeals, and does not now dispute, that he knowingly participated in a fiduciary breach when he made false representations to induce the Plans' trustee to accept properties at less than their true value.

Brock v. *Gerace,* 635 F. Supp. at 569 (plan's participants would be denied full relief if the Secretary were unable to recover from non-fiduciaries). Indeed, petitioner's narrow reading of ERISA affords participants and beneficiaries less protection of their interests in employee benefit plans than they enjoyed before ERISA was enacted,[8] and therefore should be avoided. Cf. *Firestone Tire & Rubber Co.* v. *Bruch*, 109 S. Ct. 948, 955-956 (1989).

Furthermore, the legislative history of ERISA indicates that Congress intended the statute "to provide *the full range of legal and equitable remedies available* in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits due to participants." H.R. Rep. No. 533, 93d Cong., 2d Sess. 17 (1974) (emphasis added); accord, S. Rep. No. 127, 93d Cong., 1st Sess. 35 (1973). The legislative history also

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[8] ERISA's preemption provision broadly provides that the statute supersedes state laws insofar as they "relate to any employee benefit plan." § 514(a), 11 U.S.C. 1144(a). Since civil actions to recover losses caused by breaches of fiduciary duties plainly relate to employee benefit plans and do not appear to fall into any exception to the preemption provision, such as the exception for state criminal laws (§ 514(b)(4), 11 U.S.C. 1144(b)(4)), it appears that such state causes of action are preempted. Indeed, in *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41 (1987), this Court held that ERISA preempts state causes of action against insurance companies that administer employee benefit plans, even though Section 514(b)(2)(A), 11 U.S.C. 1144(b)(2)(A), excepts from preemption state laws regulating insurance. The Court concluded from the structure of the statute and its legislative history that "ERISA's civil enforcement remedies were intended to be exclusive" (481 U.S. at 54). Accordingly, if employee benefit plans cannot recover from non-fiduciaries who participate in fiduciary breaches under Sections 502(a)(3) and (5), they may not be able to do so at all.

establishes Congress's intent to federalize the common law of trusts and to apply it with a view to the special nature and purposes of employee benefits plans. A sponsor of the Act stated: "The objectives of these provisions are to make applicable the law of trusts; * * * to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust." 120 Cong. Rec. 29,932 (1974) (remarks of Sen. Williams). Thus ERISA's legislative history "makes clear that Congress intended to incorporate into ERISA fiduciary principles developed in the law of trusts." *Kleinhans* v. *Lisle Sav. Profit Sharing Trust,* 810 F.2d 618, 626 (7th Cir. 1987). See *Firestone Tire & Rubber Co.* v. *Bruch,* 109 S. Ct. at 954; *Massachusetts Mut. Life Ins. Co.* v. *Russell,* 473 U.S. 134, 156-157 (1985) (Brennan, J., concurring) (footnote omitted) ("ERISA's legislative history also demonstrates beyond question that Congress intended to engraft trust-law principles onto the enforcement scheme, * * * and a fundamental concept of trust law is that courts 'will give to the beneficiaries of a trust such remedies as are necessary for the protection of their interests' "). Since the pre-ERISA law of trusts made non-fiduciaries liable for their knowing participation in fiduciary breaches (see pages 9-10, *supra*), the court of appeals correctly held that ERISA does as well.[9]

[9] As the court below held (Pet. App. 41a), petitioner is incorrect in asserting that a non-fiduciary's liability is limited to the extent of his profit from the breach. "[I]t is clear from those cases in which the non-fiduciary did not benefit, as well as from the way in which courts have generally stated the rule, that *participation*—not profit—is the predicate for liability." *Foltz,* 627 F. Supp. at 1168 (citations omitted) (emphasis in original). See also G. Bogert, *supra,* at 260 ("[i]n order that the third party be liable as a participant, it is not necessary to show that he benefited as a result of the transaction").

Moreover, the Secretary's interpretation of ERISA is reasonable and is therefore entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1167 (11th Cir. 1988) ("we note that we owe great deference to the interpretations and regulations of the Pension Benefit Guaranty Corporation * * *, the Internal Revenue Service * * * and the Department of Labor, which are the administrative agencies responsible for enforcing and interpreting ERISA"). Since the early days of the statute, the Secretary has consistently maintained that a non-fiduciary who knowingly participates in a fiduciary breach may be liable for losses arising out of the breach. See, *e.g.*, *Freund* v. *Marshall & Ilsley Bank, supra.* That construction is, if not clearly required by ERISA, at the very least, "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

c. The Ninth Circuit erred in *Nieto* v. *Ecker* by holding that a non-fiduciary generally cannot be held liable for knowingly participating in breaches of fiduciary duties. The court focused almost entirely on Section 409 of the Act and Section 502(a)(2), which, as noted, authorizes actions to enforce Section 409. See 845 F.2d at 875 (Wiggins, J., concurring) ("By reading section 409(a) in isolation, [the court] ignores the clear requirement of the Act to provide the broadest possible remedies under ERISA to plan beneficiaries"). That Congress specified a fiduciary's liability in Section 409, however, does not preclude construing the broad language of Sections 502(a)(3) and (5) to reach a wider class of persons who aid the commission of a fiduciary breach. As Judge Wiggins noted, Section 409(a) "is simply one section among many that impose liability on those who violate the substantive provisions" of ERISA.

845 F.2d at 875. Moreover, the analysis in *Nieto* runs headlong into the principle that a statute should be construed to effectuate its purpose. As we have shown, one important purpose of ERISA was to incorporate common law equitable trust remedies in order fully to protect employee benefit plans.[10]

The Ninth Circuit in *Nieto* also mistakenly relied (845 F.2d at 872), as does petitioner (Pet. 13), on this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell,* 473 U.S. 134 (1985). The Court held in *Russell* that fiduciaries are not liable to beneficiaries under Sections 409(a) and 502(a)(2) for extra-contractual compensatory and punitive damages resulting from the improper or untimely processing of claims.[11] The Court construed Section 409(a) as protecting the integrity of employee benefit plans rather than as redressing individual beneficiaries' rights, and thus concluded that extra-contractual damages are not available to participants under that provision (473 U.S. at 142). The Court also held that a private right of action for extra-contractual damages should not be inferred under the statute (*id.* at 145). Here, the Secretary seeks relief reimbursing the *plan* for its lost assets, thereby im-

[10] The court in *Nieto* recognized that a non-fiduciary could be liable in an action brought pursuant to Section 502(a)(3) when the non-fiduciary acted as a "party in interest" (29 U.S.C. 1002(14)(b)) and engaged in a prohibited transaction (29 U.S.C. 1106(a)). That basis for liability, standing alone, provides inadequate protection for employee benefit plans because not all non-fiduciary participants in fiduciary breaches are parties in interest and not all fiduciary breaches are prohibited transactions. There is, furthermore, no basis in the language of Sections 502(a)(3) or (5) to read those provisions to permit suits against non-fiduciaries who engage in prohibited transactions, but not against those who participate in fiduciary breaches.

[11] The Court noted that the respondent had disclaimed reliance on Section 502(a)(3), and accordingly did not analyze that Section (473 U.S. at 139 n.5).

plementing the purpose of Section 409, and the terms of Section 502(a)(5) are sufficiently broad to authorize traditional non-fiduciary liability, so that the question whether the remedy should be inferred does not arise.

The Ninth Circuit is the only court of appeals to have concluded that a non-fiduciary who knowingly participates in a fiduciary breach cannot be held liable under Sections 502(a)(3) or (5) of ERISA. As Judge Wiggins noted in his opinion concurring in the judgment on different grounds, the majority opinion "directly contradicts" *Donovan* v. *Mazzola*, 716 F.2d 1226 (9th Cir. 1983), cert. denied, 464 U.S. 1040 (1984), and "creates an intra-circuit conflict." *Nieto*, 845 F.2d at 876. Until the Ninth Circuit resolves that intra-circuit conflict, this Court should not grant review to resolve the inter-circuit conflict that *Nieto* creates.

2. The court of appeals also correctly affirmed as within the district court's discretion its order requiring petitioner to reimburse the Plans for the compensation he received from them (Pet. App. 49a). The district court issued this order as relief for petitioner's knowing participation in fiduciary breaches, including the setting of his own compensation at an unreasonable level (*id.* at 18a-19a). There is nothing novel about that relief that would warrant this Court's review. Requiring a party to disgorge the profits he has received as the result of participation in a fiduciary breach is a traditional trust remedy. See, e.g., *Donovan* v. *Daugherty*, 550 F. Supp. 390, 411 (S.D. Ala. 1982). See also *Powell* v. *Chesapeake & Potomac Telephone Co.*, 780 F.2d 419, 424, citing *Restatement (Second) of Trusts, supra*, § 205. Moreover, it is within a court's discretion to reduce or deny the compensation of a fiduciary who has committed a breach (3 A. Scott, *The Law of Trusts* § 243, at 2139 (3d ed. 1967)) and, by analogy, the same remedial tool can appropriately

be applied to a non-fiduciary participant in a breach who receives compensation from the plan (Pet. App. 49a).

Petitioner obliquely suggests that the order is inappropriate because the Department "offered no evidence regarding the unreasonableness of [his] legal fees" (Pet. 19). However, the Secretary entered into evidence the compensation agreement, which included a clause making the contract irrevocable for four years, and the district court heard petitioner's testimony as to his duties. The district court found the compensation agreement to be unreasonable (Pet. App. 11a). That conclusion is supported by the evidence and is, in any event, largely a factual matter and thus inappropriate for review by this Court.[12]

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[12] Petitioner intimates (Pet. 18-19) that the judgment below, by ordering him to refund his compensation, conflicts with the decision in *Nieto* v. *Ecker*. But the court recognized in that case that a non-fiduciary acting as a "party in interest" could be liable for "receiving excessive compensation for legal services," and that a court would have equitable authority to "undo such illegal transactions" under Section 502(a)(3). 845 F.2d at 873, 874.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

JERRY G. THORN
Acting Solicitor of Labor

ALLEN H. FELDMAN
Associate Solicitor

CHARLES I. HADDEN
Deputy Associate Solicitor

MARK S. FLYNN
Attorney

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